Magistrates to see that no undue delay occurs and that the spirit of the law rather than its letter is complied with.

In view of the confusion between the admissible and the inadmissible evidence; of the fact that the admissible evidence does not appear to have been as unassailable as the learned District Judge appeared to have thought; and of the possibility of prejudice to the appellant through the long delay in writing the grounds of decision, it is impossible for this conviction to stand. The learned Deputy Public Prosecutor who conducted the appeal did not press for an order for a re-trial in the event of my quashing the conviction and in the circumstances it would, in my opinion, be a grave injustice to the appellant to order a re-trial after all these years. I, therefore, quashed the conviction and sentence.

Appeal allowed.

WONG KIM WAH v. PUBLIC PROSECUTOR

[C. A. (Willan C.J., Pretheroe and Spenser Wilkinson JJ.) March 10, 1949]

[K. L. — F.M. Criminal Appeal No. 26 of 1949]

Penal Code, s. 396 — Gang robbery with murder —Whether proof of common intention is necessary.

In this case the appellant was charged that on June 16, 1948, he committed gang robbery and that in the commission of the said gang robbery murders were committed by one of the gang robbers and that he thereby committed an offence under s. 396 of the Penal Code. In directing the assessors the learned trial Judge said in effect that the accused could be guilty if there was a common intention to commit the robbery.

Held: the guilty act of a gang robber who commits murder in the case of a gang robbery is imputed to all the others who conjointly commit the gang robbery and there is, therefore, no need in such a case to have recourse to section 34 of the Penal Code or to consider the question of common intention.

Cases referred to:—

(1) *Public Prosecutor v. Abu Aman bin Duin & Ors.* Selangor Criminal Trial No. 51 of 1947 — Unreported.

(2) *Rex v. Yeo Kim Watt & Anor.* (1946) M.L.J. 155.

COURT OF APPEAL (CRIMINAL).

The judgment of the Court of Appeal was delivered by:—

Spenser Wilkinson J.: — The appellant was charged that on the 16th June, 1948, at Sungei Siput North he committed gang robbery and that in the commission of the said gang robbery murders were committed by one of the gang robbers and that he thereby committed an offence punishable under section 396 of the Penal Code. In directing the assessors upon the law relating to this charge the learned trial Judge said:—

"What he is charged with is participating in a gang robbery in the course of which murders were committed, and I must tell you that it is the law of this country that when a gang of people (that is five or more people) have a common intention to commit robbery (that is stealing by the use of force or by the threat of death) and in the course of carrying out that purpose a murder is committed, then every man who is a member of the gang and has gone to the scene in pursuance of the purpose of the gang, is guilty of an offence irrespective of whether or not it is he who actually commits the act of murder which is done."

We think there is no doubt that this direction was too favourable to the accused. It is in our view settled law in this country that proof of common intention is not necessary upon a charge under section 396 of the Penal Code. In *Public Prosecutor v. Abu Aman bin Duin & Ors.*[1] the following passage appears:—

"As I have already stated, in my opinion the evidence of a common intention to break into this house during the night was clear. The provisions of s. 460, however, do not make it necessary to go so far as to find a common intention to cause death or grievous hurt, and the liability to the higher penalty imposed by this section depends not upon common intention but upon the words in the section, 'every person jointly concerned in committing . . . such housebreaking by night'."

In that case the accused appealed and their appeal was dismissed. Whilst that was a decision on section 460 of the Penal Code we are of opinion that the same principles apply to section 396.

In *Rex v. Yeo Kim Watt & Anor.*[2] the Court of Criminal Appeal in the course of a judgment dealing with the question whether section 34 could apply to sections 392 and 393 said:—

" . . . . there is no need to have recourse to s. 34 in considering s. 394 because under that section the guilty act of the robber who causes hurt in committing the robbery is imputed to all the others who are jointly concerned in the commission of the robbery, and it would not avail any one of the others to say he had nothing to do with the causing of such hurt. We might add that a similar liability attaches itself to each member of the gang under s. 396 when one of such members commits murder during the actual gang robbery."

It follows from this that the guilty act of a gang robber who commits murder in the case of a gang robbery is imputed to all the others who conjointly commit that gang robbery and there is, therefore, no need in such a case to have recourse to section 34 or to consider the question of common intention.

As the appellant in the present case was convicted in spite of the view of the law expressed by the learned trial Judge the decision in this appeal could not be affected thereby and the appeal was accordingly dismissed.

Appeal dismissed.